County Agency, Inc. *and* United Food and Commercial Workers, Local 2013. Case 29–CA–142690

October 28, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

The General Counsel seeks a default judgment in this case pursuant to the terms of an informal settlement agreement. Upon a charge and an amended charge filed by United Food and Commercial Workers, Local 2013 (the Union) on December 11, 2014, and February 13, 2015, respectively, alleging that the Respondent violated Section 8(a)(5) and (1) of the Act, the Respondent and the Union entered into an informal settlement agreement on February 20, 2015, which was approved by the Regional Director for Region 29 on the same date. The settlement agreement required the Respondent to: (1) upon request, bargain with the Union as the exclusive collective-bargaining representative of the unit employees; (2) provide the Union with the presumptively relevant information it requested on September 22, 2014; and (3) post appropriate notices.

The settlement agreement also contained the following provision:

> The Charged Party agrees that in case of non-compliance with any of the terms of this Settlement Agreement by the Charged Party, and after 14 days notice from the Regional Director of the National Labor Relations Board of such non-compliance without remedy by the Charged Party, the Regional Director will issue a complaint that includes the allegations covered by the Notice to Employees, as identified above in the Scope of Agreement section, as well as filing and service of the charge(s), commerce facts necessary to establish Board jurisdiction, labor organization status, appropriate bargaining unit (if applicable), and any other allegations the General Counsel would ordinarily plead to establish the unfair labor practices. Thereafter, the General Counsel may file a Motion for Default Judgment with the Board on the allegations of the Complaint. The Charged Party understands and agrees that all of the allegations of the Complaint will be deemed admitted and that it will have waived its right to file an Answer to such Complaint. The only issue that the Charged Party may raise before the Board will be whether it defaulted on the terms of this Settlement Agreement. The General Counsel may seek, and the Board may impose, a full remedy for each unfair labor practice identified in the Notice to Employees. The Board may then, without necessity of trial or any other proceeding, find all allegations of the Complaint to be true and make findings of fact and conclusions of law consistent with those allegations adverse to the Charged Party on all issues raised by the pleadings. The Board may then issue an Order providing a full remedy for the violations found as is appropriate to remedy such violations. The parties further agree that a U.S. Court of Appeals Judgment may be entered enforcing the Board Order ex parte, after service or attempted service upon Charged Party at the last address provided to the General Counsel.

By letter dated February 27, 2015, the Regional Director for Region 29 advised the Respondent to take the steps necessary to comply with the terms of the settlement agreement. By email dated March 26, 2015, the compliance officer for Region 29 advised the Respondent that it had not documented its compliance with its obligations under the settlement agreement and advised the Respondent that documentation of the following was due: (1) notice posting processing and completion of the required Certification of Posting form; (2) providing the Union with the information it requested; and (3) maintaining a record of all relevant correspondence regarding bargaining with the Union. Although the Respondent's counsel replied that he hoped to have all appropriate signatures by the following Monday, the Respondent did not comply. By letter dated April 14, 2015, the Acting Regional Director for Region 29 notified the Respondent of its default under the terms of the settlement agreement. The letter also stated that, if the Respondent did not cure its default by April 28, 2015, the Regional Director would revoke the settlement agreement and issue a complaint, and he would thereafter seek default judgment on the allegations of the complaint. The Respondent did not respond to the letter.

Accordingly, pursuant to the terms of the noncompliance provisions of the settlement agreement, on May 19, 2015, the Regional Director issued an order revoking the settlement agreement, and a complaint and notice of hearing. The Respondent filed an answer. On June 16, 2015, the General Counsel filed a Motion for Default Judgment with the Board. On June 24, 2015, the Board issued an order transferring the proceeding to the Board and Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Default Judgment

In its response to the Notice to Show Cause, the Respondent asserts that the Board should not grant the General Counsel's motion but should instead direct the Regional Director to reinstate the settlement agreement with the caveat that the Respondent must wholly comply with its terms within 30 days of reinstatement, or hold a hearing on the allegations in the complaint. The Respondent argues that it never sought to actively defy the Board or the dictates of the Act, the complaint allegations were baseless and were promptly denied, and the settlement agreement explicitly contained a nonadmission clause. Further, given its "consistent denials of wrongdoing under the Act," the Respondent contends that the requested relief "is wholly inappropriate, notwithstanding the language of the Informal Settlement Agreement." In addition, although the Respondent admits that it has not provided the Union with requested information or posted the notices required by the settlement agreement, the Respondent denies that it failed or refused to bargain with the Union. The Respondent asserts that it must now wait for a court-enforced Board Order before complying with the settlement agreement that has been revoked, and it wishes to have an opportunity to comply with the settlement agreement "in the interests of maintaining a collegial relationship with the Union."

The noncompliance provision in the settlement agreement provides that "[t]he Charged Party understands and agrees that all of the allegations of the Complaint will be deemed admitted and that it will have waived its right to file an Answer to such Complaint."[1] In addition, the noncompliance provision in the settlement agreement provides that "[t]he only issue that the Charged Party may raise before the Board will be whether it defaulted on the terms of this Settlement Agreement." The agreement further provides that "[t]he Board may then, without necessity of trial or any other proceeding, find all allegations of the Complaint to be true and make findings of fact and conclusions of law consistent with those allegations adverse to the Charged Party on all issues raised by the pleadings."

As described above, the General Counsel alleges that the Respondent has failed to comply with the terms of the settlement agreement by failing to provide the Union with the requested information, failing to bargain with the Union, and failing to send to the Regional Office signed copies of the Notice to Employees along with a certification of posting. Importantly, as noted above, the Respondent admits in its response to the Notice to Show Cause that it failed to provide the Union with the requested information and that it failed to post the Notice to Employees. Moreover, the Respondent provides no support for its general denial that it failed to bargain with the Union and its admissions establish that it did not comply with its obligations under the settlement agreement. Consequently, pursuant to the noncompliance provisions of the settlement agreement set forth above, we find that all of the allegations in the complaint are true.[2] Accordingly, we grant the General Counsel's Motion for Default Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent has been a domestic corporation, with its principal office and place of business located at 129 South 8th Street, Brooklyn, New York, and has been providing Professional Employer Organization services, including provision of personnel and other human resources functions to customers.

During the 12-month period preceding issuance of the complaint, which is representative of its annual operations in general, the Respondent has provided services valued in excess of $50,000 to its customers in the State of New York, which each meet a Board direct test for the assertion of jurisdiction.

[1] Accordingly, because the Respondent has waived its right to file an answer, we strike the Respondent's answer. Member Miscimarra finds it unnecessary to address this issue. See fn. 2, below.

[2] See *U-Bee, Ltd.*, 315 NLRB 667, 668 (1994).

Member Miscimarra joins in the entry of a default judgment although two aspects of this disposition warrant explanation. First, Respondent's response to the Notice to Show Cause confirms that the Respondent failed to comply with the settlement agreement, and the settlement agreement clearly provides that, in the event of a breach, (i) the Regional Director would issue a complaint based on the same allegations, (ii) "all of the allegations of the Complaint will be deemed admitted" and the "only issue that the [Respondent] may raise before the Board will be whether it defaulted on the terms of [the] Settlement Agreement," (iii) the Respondent "will have waived its right to file an Answer to such Complaint," (iv) the General Counsel "may file a Motion for Default Judgment . . . ," and (v) the Board may "find all allegations of the Complaint to be true and make findings of fact and conclusions of law consistent with those allegations adverse to the [Respondent] on all issues raised by the pleadings." Because Respondent admitted its failure to comply with the settlement agreement, and because the settlement agreement clearly details the consequences of noncompliance, Member Miscimarra believes these circumstances warrant the entry of a default judgment. Second, although the settlement agreement provides that the Respondent waives any "right to file an Answer to [the] Complaint," the Regional Director's complaint stated (contrary to the settlement agreement) that the Respondent "must file an answer to the complaint," and the Respondent filed an answer. Member Miscimarra finds it unnecessary to decide whether Respondent's answer must be stricken because the settlement agreement states all complaint allegations "will be deemed admitted" in the event of noncompliance, and Respondent (as noted above) has admitted its noncompliance with the settlement agreement.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The following employees of the Respondent (the unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and part-time employees excluding executives, supervisors, and guards as defined in the Labor Management Relations Act, as amended.

At all material times, the Charging Party has been the designated collective-bargaining representative of the unit. Such recognition has been embodied in a collective-bargaining agreement, which by its terms was effective from February 1, 2012, to January 31, 2015.

At all material times, the Charging Party, by virtue of Section 9(a) of the Act, has been the exclusive collective-bargaining representative of the unit.

About September 22, 2014, the Charging Party requested that the Respondent bargain collectively over the terms of a successor collective-bargaining agreement.

Since about September 22, 2014, the Respondent has failed and refused to bargain collectively about the subjects set forth above.

The subjects set forth above relate to the wages, hours, and other terms and conditions of employment of the unit and are mandatory subjects for the purposes of collective bargaining.

Since about September 22, 2014, the Charging Party has requested in writing that the Respondent furnish the Charging Party with the following information:

> 1. Name, title, address, telephone number, and email of any person who is required to approve any bargained-for provision of any collective-bargaining agreement between UFCW Local 2013 and the above listed company;
>
> 2. Name, title, address, telephone number, and email of any person who determines labor relations policy with regard to the collective-bargaining agreement;
>
> 3. Name, address, telephone number, date of hire, classification, rate of pay, date of birth, sex (M/F), marital status, full-time or part-time status, termination date (if applicable), and number of dependents for each employee in the bargaining unit;
>
> 4. A complete structure of job classification and descriptions and responsibilities for each;
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> 5. Average weekly number of employees and hours worked at each classification and rate;
>
> 6. Copy of all company policies; (i.e.) vacation, overtime, holidays
>
> 7. Copy of employee handbook;
>
> 8. Copy of all disciplinary policies;
>
> 9. Copy of FMLA polices and/or procedures;
>
> 10. A roster of bargaining unit employees' health & welfare and annuity contributions;
>
> 11. Copy of new hire orientation packets;
>
> 12. Copy of OSHA 300 log for the past contract term.

The information requested by the Charging Party, as described above, is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the unit.

Since about December 10, 2014, the Respondent has failed and refused to furnish the Union with the information requested by it as described above.

CONCLUSION OF LAW

By the conduct described above, the Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees, in violation 8(a)(5) and (1) of the Act. The Respondent's unfair labor practices described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has violated Section 8(a)(5) and (1) by failing and refusing to provide information to the Union that is necessary and relevant to the Union's performance of its duties as the exclusive collective-bargaining representative of the unit employees, we shall order the Respondent to furnish the Union with the information that it requested about September 22, 2014. In addition, having found that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain collectively over the terms of a successor collective-bargaining agreement, we shall order the Respondent to bargain with the Union, on request, as the exclusive collective-bargaining representative of the unit employees concerning terms and conditions of employment and, if an understanding is reached, to embody the understanding in a signed agreement.

ORDER

The National Labor Relations Board orders that the Respondent, County Agency, Inc., Maspeth, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain with United Food and Commercial Workers, Local 2013 (the Union) as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and part-time employees excluding executives, supervisors, and guards as defined in the Labor Management Relations Act, as amended.

(b) Failing and refusing to provide the Union with requested information that is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the unit.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the unit employees concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(b) Furnish the Union with the information it requested about September 22, 2014.

(c) Within 14 days after service by the Region, post at its facility in Maspeth, New York, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 22, 2014.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 29 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. October 28, 2015

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Mark Gaston Pearce, Chairman

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Philip A. Miscimarra, Member

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Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain with United Food and Commercial Workers, Local 2013 as the exclusive collective-bargaining representative of our employees in the following appropriate bargaining unit:

> All full-time and part-time employees excluding executives, supervisors, and guards as defined in the Labor Management Relations Act, as amended.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT fail and refuse to provide the Union with requested information that is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain with United Food and Commercial Workers, Local 2013 as the exclusive collective-bargaining representative of the employees in the unit concerning terms and conditions of employment, and WE WILL put in writing and sign any agreement reached.

WE WILL furnish the Union with the information it requested about September 22, 2014.

COUNTY AGENCY, INC.

The Board's decision can be found at www.nlrb.gov/case/29-CA-142690 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.